80-5950

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. ___

LAVERNE L. LOGAN, Appellant,

v.

ZIMMERMAN BRUSH COMPANY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellant, Laverne L. Logan, asks leave to file the attached Jurisdictional Statement without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The appellant's affidavit in support of this motion is attached hereto.

Gary H. Palm
Counsel for Appellant

Gary H. Palm
Mark C. Weber
Counsel for Appellant
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

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AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Laverne L. Logan, being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the question and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Yes.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

$507.00 per month. Libby, McNeil & Libby, 200 South Michigan, Chicago, Illinois 60604.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes.

a. If the answer is yes, describe the property and state its approximate value.

Five shares common stock of previous employer, Quaker Oats Co.; total approximate value: $85.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Mary Logan, wife.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

LaVerne L. Logan

Subscribed and Sworn to before me this 19th day of December 1980.

Notary Public

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does due process prevent the termination of an employment discrimination charge without a hearing on the merits when the sole basis for the termination is that the state administrative agency responsible for investigating charges has negligently failed to convene a fact finding conference within the statutory time period?
2. Does it violate the equal protection rationality standard when a charge of employment discrimination is terminated solely because the state agency responsible for investigating such charges fails to convene a fact finding conference within the statutory time period?

LIST OF PARTIES

Laverne L. Logan, Appellant.

Zimmerman Brush Company, Appellee.

The Illinois Fair Employment Practices Commission.

Delores Neighbors, Investigator of said Commission.

Connie Villaba, Unit Coordinator of said Commission.

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OPINION BELOW

This opinion of the Supreme Court of Illinois is reported at ___ Ill.2d ___, ___ N.E.2d ___, Slip Op. No. 53199 (September 29, 1980), Appendix A at 1a.

JURISDICTION

The judgment of the Supreme Court of Illinois, granting the original writ of prohibition and terminating appellant's pending action before the Illinois Fair Employment Practices Commission was entered on September 29, 1980. See Appendix A at 1a.

The notice of appeal to this Court was duly filed in the Supreme Court of Illinois on December 22, 1980. This appeal is being docketed within 90 days of the judgment below.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 to the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, §19, of the Illinois Constitution provides in pertinent part:

> All persons with a physical or mental handicap ... shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

The Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 et seq. (1979) (recodified as the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, §1-101 et seq., effective July 1, 1980). Pertinent sections are set forth in Appendix B at a.

STATEMENT OF THE CASE

On September 29, 1980, the Illinois Supreme Court granted appellee Zimmerman Brush Co. ("the Company") a writ of prohibition barring the Illinois Fair Employment Practices Commission ("the Commission") from ever reaching a decision on the merits of appellant Laverne Logan's charge of employment discrimination under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 et seq. (1979), Appendix B at 9a, ("the FEPA"). Although Mr. Logan had complied with all procedural requirements in a timely fashion, his claim was terminated because the Commission had failed to perform its statutory duty of convening a fact finding conference within 120 days of the filing of the charge.

Mr. Logan filed his charge with the Commission on November 14, 1979 alleging that the Company had discriminated against him because of his physical handicap, a club ankle and short right leg. The discrimination occurred when the Company terminated Mr. Logan's employment on November 9, 1979. At the time he filed his charge, Mr. Logan was not represented by an attorney.

Mr. Logan filed his charge pursuant to Section 853(c) of the FEPA, which provides that it is an unfair employment practice to discriminate in the conditions of employment against an individual because of a physical handicap unrelated to ability.

Section 858(8)(a) of the FEPA requires that a person alleging an unfair employment practice file a charge with the Commission within 180 days of the date of the occurrence of the alleged unfair practice. It is then the Commission's responsibility to undertake an investigation to ascertain the facts relating to the alleged unfair employment practice. If the Commission finds "substantial evidence" supporting the charge, it issues a complaint. Ill. Rev. Stat. ch. 48, §858(8)(c) (1979). If the Commission finds "no substantial evidence" and dismisses the charge, the victim of the discrimination can seek judicial review of the Commission's action. Ill. Rev. Stat. ch. 48, §860 (1979). The Commission has 300 days from the date the charge was filed to complete its investigation and either dismiss the charge or issue a complaint. Ill. Rev. Stat. ch. 48, §858(8)(d) (1979).

The FEPA directs the Commission to convene a fact finding conference within 120 days of the date the charge

was filed. The purposes of this conference are: "obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." Ill. Rev. Stat. ch. 48, §858(b) (1979).

In this case, Mr. Logan complied with the 180 day limit for the filing of a charge by filing his charge only five days after the Company terminated his employment. It then was the Commission's responsibility to convene a fact finding conference within 120 days (by March 13, 1980). On January 28, 1980 (45 days before the end of the 120 day period) the Commission notified the parties that they would be required to attend a fact finding conference on March 18, 1980 (five days after the expiration of the 120 day period). Mr. Logan was not represented by an attorney at the time the date of the fact finding conference was set. On January 28, 1980, the Commission also sent a questionnaire to the Company and directed that the Company submit answers by March 10, 1980. On March 7, 1980, the Company submitted answers to the Commission's questionnaire. The Company did not object at this time to the March 18 date for the conference.

On March 18, 1980, at the beginning of the conference, the Company's attorney presented the Commission's investigator with a written motion asserting that because the conference had not been convened within 120 days of filing, the charge should be dismissed. The investigator's supervisor denied the motion, and the Company's attorney refused to participate in the fact finding con-

ference. Mr. Logan continued to appear pro se at the conference.

Two days later, the Company filed a motion for leave to file its petition for an original writ of prohibition in the Illinois Supreme Court. On March 25, 1980, that court entered an order granting the Company leave to file its petition for an original writ of prohibition. The court also stayed proceedings on Mr. Logan's charge pending disposition of the petition.

Mr. Logan sought legal assistance from the Edwin F. Mandel Legal Aid Clinic of the University of Chicago on April 23, 1980. Because 180 days had not passed since the act of discrimination, Mr. Logan filed a new charge raising the identical claim.

Mr. Logan also responded to the Company's petition for a writ of prohibition by filing with the Illinois Supreme Court a motion to dismiss or, in the alternative, to stay proceedings on the Company's petition. He argued that to terminate his claim simply because the Commission had failed to convene a fact finding conference within 120 days would violate his constitutional rights under the Fourteenth Amendment to due process and equal protection. He also argued that because he had filed a second identical charge within the 180 day period, the Company's petition should be denied on the grounds that it had become moot.

The Illinois Supreme Court awarded the Company a writ of prohibition on September 29, 1980. The court rejected both Mr. Logan's constitutional arguments and his claim of mootness. The court held that the Commission's

failure to convene a fact finding conference within 120 days of the filing of the charge terminated Mr. Logan's claim despite the fact that Mr. Logan had complied with all requirements in a timely fashion. The court also said that Mr. Logan should not be allowed to pursue his second charge through the Commission even though again Mr. Logan had complied with all procedural requirements. Zimmerman Brush Co. v. Illinois Fair Employment Practices Commission, Slip Opinion No. 53199 (September 29, 1980), Appendix A at 1a.

THE QUESTIONS ARE SUBSTANTIAL

I. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER DUE PROCESS PREVENTS AN INDIVIDUAL'S CLAIM FROM BEING EXTINGUISHED SOLELY BECAUSE OF ADMINISTRATIVE NEGLECT.

The Supreme Court of Illinois held below that a person's right to seek redress for unlawful employment discrimination may be extinguished by the negligent conduct of the state's administrative agency. The court decided that although the state legislature had created a right to redress, the inaction or inattention of the state's administrative personnel may make the right meaningless in practice. The case accordingly presents a substantial question concerning the power of state officials to extinguish state-created rights without any process -- indeed, to extinguish them for the very reason that the agency did not follow prescribed procedures.

The problem is bound to arise frequently in Illinois because the Commission, like state and federal courts, is sorely taxed by the volume of cases presented for disposition. This Court has not yet determined the extent

to which an individual may be deprived of an interest solely for reasons of administrative convenience and efficiency. The present case demonstrates how overzealous solutions can violate the due process right of parties to have their cases heard and decided.

In recent opinions, the Illinois Supreme Court has determined that certain deadlines included in the FEPA serve significant public purposes, that these deadlines must be regarded as mandatory, and that no case may proceed if the Commission misses such a deadline. See Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill. 2d 61, 373 N.E.2d 1307 (1978); Board of Governors v. Illinois Fair Employment Practices Commission, 78 Ill. 2d 143, 399 N.E.2d 590 (1979), appeal dismissed, 49 U.S.L.W. 3243 (1980); Zimmerman Brush Co. v. Illinois Fair Employment Practices Commission, Appendix A at 1a. The result of these decisions is that Mr. Logan and over 2000 others who have charges pending before the Commission must have their claims extinguished because of the Commission's negligence, and without any decision on the individual merits of each charge.[1/]

This case presents the substantial question of whether an individual has a right to expect some kind of

---

1/ These decisions require that in all cases when the FEPC has failed to observe statutory deadlines, charges must be dismissed. Over 2000 such cases were pending as of 1979. Affidavit of James E. Braxton, Executive Director of the Illinois Fair Employment Practices Commission, Appendix C at 17a.

decision based on the merits of his claim.[2/] What is the minimum treatment which an administrative agency must afford a charge that is brought before it? May an agency terminate a charge without regard to its validity or the diligence of the parties, but only to serve the goal of bureaucratic expedience? In the present case, the Commission accepted and filed Mr. Logan's charge but failed to act upon it within the time required by law. Although he was in no way responsible for the Commission's procedural mistake, his claim has been extinguished without any consideration of its merits. Mr. Logan asks this Court to determine that due process prevents this result.

A. The Termination of Mr. Logan's Claim Without a Decision on Its Merits Violates Due Process.

Mr. Logan asks this Court to determine that the termination of his claim because of the Commission's negligent failure to schedule a fact finding conference within the 120 day period deprived him of due process. This Court has determined that even a legitimate concern for administrative speed and efficiency will not serve to eliminate due process rights.[3/]

2/ Throughout this Jurisdictional Statement, appellant uses the phrases "decision on the merits" and "merit-based decision" to include not only decisions based upon the law and the facts of the underlying charge but also decisions based upon the conduct of the complainant and respondent in the course of proceedings, e.g., dismissal for failure to state a cause of action, default for failure to appear or prosecute, etc.

3/ See, e.g., Stanley v. Illinois, 405 U.S. 645 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

Due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965), "for hearing appropriate to the nature of the case," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The exact timing of the hearing may vary. Opp Cotton Mills, Inc. v. Administrator, Department of Labor, 312 U.S. 126, 152-53 (1941). The degree of formality may vary. Goss v. Lopez, 419 U.S. 565 (1975).

Regardless of the timing and formality of the hearing, a merit-based decision is the minimum requirement of due process. In Bell v. Burson, 402 U.S. 535 (1971), this Court struck down a Georgia statute which provided for the suspension of the driver's license of an uninsured motorist who was involved in an accident unless security was posted equal to the amount of damages claimed. The statute provided for a hearing, but required that the question of the driver's fault be excluded from consideration at that hearing. Although the Court did not require that a full adjudicative hearing be held, it stated that procedural due process would require a preliminary inquiry to determine whether there was a reasonable possibility that a judgment would be rendered against the licensee. Id. at 540.

In Barry v. Barchi, 443 U.S. 55 (1979), the Court required a merit-based decision before the temporary suspension of a racehorse trainer whose horses had been drugged. Because the state had adduced evidence demonstrating probable cause that the trainer was at least negligent with respect to the drugging, a temporary sus

pension was permissible pending a prompt and effective adversary hearing. In both Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), a decision on the merits was required before a private party could avail himself of state procedures for altering property rights of other private parties even though the alteration would involve only a temporary deprivation. Mathews v. Eldridge, 424 U.S. 319 (1976), held that Social Security disability benefits could be terminated without a prior full hearing because several merit-based decisions were required, i.e., preliminary state review of medical evidence, determination by administrative officials after notice and comment, de novo review and formal hearing. See also Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits not to be terminated without a decision on the merits); Goss v. Lopez, 419 U.S. 565 (1975) (in school suspension cases, students to have rights to informal hearing and review).

The termination of Mr. Logan's claim prevented him from receiving a decision on the merits. First, there was no evaluation of the strength of his case. Mr. Logan agrees that the legislature could provide for the screening of cases by the Commission and that the procedures provided in the FEPA would have been constitutionally sufficient if they had provided for this screening. Mr. Logan also agrees that the use of the "substantial evidence" test in the FEPA for the evaluation of cases is appropriate. In the instant case, however, the Commission never made such a determination. Mr. Logan, in fact, is worse off than if the Commission had found no

substantial evidence, because that finding would have been reviewable in the state courts. Mr. Logan is instead left with no review and no cause of action due to a process which is purely arbitrary.

Second, the termination of Mr. Logan's charge was not based on any procedural failing by him. Mr. Logan did not delay the proceedings. The termination is unlike dismissal for failure to comply with a statute of limitations. Ordinarily the individual controls the initiation of the proceedings and is fairly held accountable for failing to meet statutory deadlines. In this case, Mr. Logan filed his charge only five days after the discriminatory act, well within the 180-day time limit provided by the FEPA. He complied with all the procedural requirements of the statute, only to have his claim extinguished because of neglect by the administrative agency processing it.

Martinez v. California, 444 U.S. 277 (1980), held that a state may limit the due process protections to be afforded certain statutory claims, provided the conduct of the state is not "wholly arbitrary or irrational." Id. at 282. The conduct of the state in terminating Mr. Logan's charge is wholly arbitrary and irrational in violation of the due process clause, because it is based neither on an evaluation of the strength of his claim nor on a determination of his diligence as a plaintiff.

B. A Complainant's Cause of Action Under the Fair Employment Practices Act is an Interest Protected by the Due Process Clause.

Although defendants' rights to due process in civil actions have long been recognized by this Court, the

rights of plaintiffs have not been clearly delineated. This case directly presents the issue of whether a state can arbitrarily and irrationally terminate a plaintiff's cause of action without violating due process. The underlying issue is whether a state-created cause of action to vindicate claims of employment discrimination is protected under the due process clause. This is an open question in light of the holdings in Mullane v. Central Hanover Bank & Trust Co, 339 U.S. 306 (1950); Boddie v. Connecticut, 401 U.S. 371 (1971); United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973); and Martinez v. California, 444 U.S. 277 (1980).

The Court has implied that the right of plaintiffs to bring suit to protect existing property rights is itself a protected interest. In Mullane, notice by publication was held insufficient to notify known trust beneficiaries of a judicial settlement of trust accounts. Due process required that the beneficiaries be given the opportunity to appear and be heard at the settlement proceedings. The Court found a protected interest in the rights of parties "to have the trustee answer for negligent or illegal impairments of their interests." 339 U.S. at 313.

In Boddie, the Court left open the question of whether a plaintiff's right of access to the judicial system is a protected interest. Boddie was a class action on behalf of indigent married women who had been barred from access to the courts to obtain divorces by their inability to pay court costs. The Court held that

"a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." 401 U.S. at 380. Although the suit was brought by "would-be plaintiffs," the Court reasoned that plaintiffs' plight was "akin to that of defendants." Id. at 376. The Court stressed:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual. . . .

Id. at 382-83. The Court addressed this question in two later cases, United States v. Kras, and Ortwein v. Schwab, and found that filing fees may be imposed on indigents in the contexts of bankruptcy and welfare appeals.[4/]

Furthermore, this Court has held that indigent prisoners must be provided at the state's expense with adequate law libraries or adequate assistance from persons trained in the law. In Bounds v. Smith, 430 U.S. 817 (1977), the Court declared that "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts." Id. at 821. Bounds held that prisoners have a right of access for filing civil rights actions and prosecuting criminal appeals:

> By contrast [to a discretionary review petition] in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has

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4/ See "Developments in the Law--Class Actions," 89 Harv. L. Rev. 1318, 1404 (1976), which noted that commentators are divided on when a plaintiff's right to file a cause of action is a protected interest.

> "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights.

Id. at 827 (citations omitted; emphasis added). Similarly, the appellant in the instant case seeks the right of access to the judicial system to vindicate an important civil rights -- the right to be free from unlawful discrimination in his employment.5/

In Martinez v. California, the Court explicitly left open the question of whether due process attaches to a wrongful death action. This Court recognized that a state-created cause of action is arguably "a species of 'property' protected by the Due Process Clause." 444 U.S. at 281-82. However, a resolution of this issue was not reached in Martinez because the Court determined that, even if the plaintiff's claim was a protected interest, due process had not been violated.

The FEPA creates interests which are entitled to due process protection. It establishes a substantive right to discrimination-free employment and a cause of action to vindicate that right. The FEPA affirmatively attempts to regulate private employer conduct to protect that right, offering individuals protection from discrimination on the basis of race, color, religion, sex, national origin, ancestry or physical or mental handicap. The statute provides for the awarding of attorney's fees to a

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5/ The Bounds "right of access" reasoning has been extended to civil actions outside the prisoners' rights realm. See Britt v. Suckle, 453 F. Supp. 987, 1002 (E.D. Tex. 1978) (where the court held that "adjudication of state-granted rights [to a negligence claim] is implicit in the whole constitutional scheme.")

successful complainant. Employers are expressly prohibited from retaliating against employees who have opposed any discriminatory act or who have "made a charge, testified or assisted in any investigation, proceeding, or hearing under the [FEPA]." Ill. Rev. Stat. ch. 48, §853 (d) (1979). Employees are thus affirmatively encouraged to rely on the statutory protection and to file claims under the statute.

The interests protected by the FEPA are particularly important. The enactment of the FEPA itself evidences a strong state policy against employment discrimination. The right is also guaranteed by the Illinois Constitution, which states in relevant part that "[a]ll persons with a physical or mental handicap ... shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer." Ill. Const. art. I, §19. Freedom from discrimination involves a right underlying the prohibition against unequal treatment in the Fourteenth Amendment. The FEPA is part of the joint federal-state effort to combat employment discrimination envisioned by Congress when it enacted Title VII. 42 U.S.C. §2000e-5. Furthermore, the FEPA protects an individual's employment, which, like the welfare benefits in Goldberg v. Kelly, 397 U.S. 254, 264 (1970), provided Mr. Logan with "the very means by which to live. . . ."

The cause of action created by the FEPA is to be sharply distinguished from an action totally controlled by an agency or government official such as that provided for by the National Labor Relations Act, 29 U.S.C. §151 et seq. ("NLRA"). Under the NLRA, the cause of action

for an unfair labor practice vests in the National Labor Relations Board ("NLRB") and the prosecution of such a case is controlled entirely by the NLRB General Counsel. The unfair labor practice complainant has no control over the prosecution of his case and the General Counsel's refusal to issue a complaint is not reviewable either by the NLRB or, in general, by the courts. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-39 (1975).

By contrast, a victim of employment discrimination is given a private cause of action under the FEPA. In cases where the Commission finds substantial evidence within the 300 days allotted under the statute, it issues a complaint. From that point on, the action is controlled entirely by the complainant. The complainant prosecutes his own case, filing appropriate motions, controlling discovery and pre-hearing procedures, and presenting evidence and argument at a public hearing. Ill. Rev. Stat. ch. 48, §858.01(b) (1979). Additionally, the FEPA gives a complainant the right under the Administrative Review Act for judicial review in the Circuit Court of any "order of the Commission," including review of a Commission's finding of no substantial evidence or a final Commission decision on the merits. Ill. Rev. Stat. ch. 48, §860 (1979). The only time that the progress of the proceedings is out of the control of the complainant is during investigation by the Commission.

Mr. Logan not only had a private cause of action, but had already filed his charge pro se with the Commission and was awaiting his fact finding conference when his rights were terminated. Thus, his case presents a

number of factors that justify due process protection: (1) a private cause of action; (2) an important state policy against discrimination; (3) a claim that had already been filed; and (4) a pro se claim in an administrative structure designed to adjudicate pro se claims.

The private cause of action created by the FEPA is a protected interest within the meaning of the Fourteenth Amendment, not merely a right conditioned upon the absence of neglect on the part of the Commission. Six members of this Court in Arnett v. Kennedy, 416 U.S. 134 (1974), rejected the claim that a state statute may simultaneously create a substantive right and limit the circumstances in which that right may be vindicated. As stated by Mr. Justice Powell, "[t]his view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee." Once the legislature has conferred a protected interest, "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Id. at 167 (Powell, J., concurring).

II. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER TERMINATION OF MR. LOGAN'S CLAIM SOLELY BECAUSE THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION FAILED TO CONVENE A FACT FINDING CONFERENCE WITHIN 120 DAYS IS IRRATIONAL AND VIOLATES EQUAL PROTECTION.

This Court should determine the termination of rights solely because of the Commission's failure to convene a fact finding conference within 120 days is irrational in violation of equal protection. Two claims may be filed at the same time and involve the same

allegations, yet one of these claims would be investigated and adjudicated, while the other, through no fault of the claimant, would be dismissed with no determination of its merits. Rather than drawing a distinction between two such cases based on their relative strength or the diligence of the parties in prosecuting their claims, the Supreme Court of Illinois has determined that the distinction may be based solely on the action or inaction of the Commission -- be it negligent, malicious, or haphazard.

This Court has consistently recognized that statutory classifications must meet the minimum test of rationality in order to comply with the requirements of equal protection.[6/] A test of legislative enactments was formulated by Chief Justice Warren writing for a unanimous Court in McGowan v. Maryland, 366 U.S. 420 (1961):

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.

In recent years, this Court has continued to examine legislative classifications by considering whether there is a rational basis for the classification in light of

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6/ See, e.g., Jimenez v. Weinberger, 417 U.S. 628 (1974); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

the legislative purposes to be served. Under this approach, the Court will not overturn a statutory classification

> unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97 (1979). Most recently, in United States Railroad Retirement Board v. Fritz, 49 U.S.L.W. 4035 (1980), this Court noted that the tests applied in earlier cases have not been "altogether consistent." Id. at 4038. In Fritz, the Court examined the rationality of the Congressional determinations underlying the statutory classification, and asked whether "Congress achieved its purpose in a patently arbitrary or irrational way." Id.7/

The classification at issue in the present case fails to provide equal protection under any minimum scrutiny test articulated by this Court. The failure of the Commission to hold a fact finding conference within 120

7/ In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held unconstitutional a statute providing that unwed fathers could lose parental rights without a hearing on the merits of their fitness as parents, while providing for such hearings for married parents and unwed mothers. This Court found that the statute denied unwed fathers the basic procedural right of a decision on the merits of a claim in the state courts, and concluded on the basis of this finding that the law was "inescapably contrary to the Equal Protection Clause." Id. at 658. The Court characterized its analysis as, "[p]redicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated. . . ." Id. n. 10. The Illinois Supreme Court has denied to Mr. Logan the same bedrock right to a decision on the merits which it accords all complainants whose charges are properly processed under the 120-day rule.

days is not a rational way of choosing which cases should be allowed to proceed. This rule penalizes complainants, even though they have no control over meeting the deadline. It operates without regard to the relative merits of particular cases.

Furthermore, such a rule bears no reasonable relation to the two legislative purposes of the FEPA: to protect persons from discrimination in employment "because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability or unfavorable discharge from military service" and to protect employers from "unfounded charges of [employment] discrimination." Ill. Rev. Stat. ch. 48, §851 (1979). Explaining these purposes in its discussion of fact finding conferences, the Supreme Court of Illinois stated that the conferences serve "the interests of both employee and employer," and that the Commission may avoid "unnecessary costs" if a settlement can be reached. Finally, the conference "places the Commission in a better posture to decide whether to dismiss the employee's charge" or process it further. Zimmerman Brush Co., Appendix A at 5a.

The purposes expressly stated in the FEPA, as well as those which the Supreme Court of Illinois found applicable to fact finding conferences, may be realized only through a determination on the merits of each charge of employment discrimination. A victim of discrimination may obtain a remedy for the wrong he has suffered only if his case is decided. Similarly, an innocent employer may be cleared of a charge only if a decision is reached on

the merits. The interests of both parties and the Commission in an early settlement and efficient processing of the case can be served only if there is an opportunity to evaluate the merits of that case.

Mr. Logan concedes that the legislature and the courts may properly be concerned about administrative backlogs. However, while random or arbitrary termination of claims will reduce the backlog, such an approach cannot be reconciled with the purpose of the statute. In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court struck down a legislative classification by which men who applied for appointment as administrators were given preference over similarly situated women, without any determination on the merits of their respective applications. The Court found the goal of the classification to be avoidance of contests between relatives of the decedent for selection as administrator. Although this goal may be legitimate, elimination of a category of persons who are seeking a decision on the merits of their applications is not a rational means to accomplish it:

> Clearly, the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . .

Id. at 76. See Stanley v. Illinois, 405 U.S. at 656-657. ("The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest. . . . But the Constitution recognizes higher values

than speed and efficiency. . . . Procedure by presumption is always cheaper and easier than individualized determination.") If backlogs are to be reduced, the charges must be screened, the unmeritorious cases dismissed, and the meritorious cases decided.8/

A scheme which terminates a charge solely because the Commission fails to convene a timely fact finding conference creates two irrational distinctions between otherwise indistinguishable claims. The first is that one will be afforded a decision on the merits while the other will never be decided. The second distinction involves the availability of judicial review. If the Commission investigates a charge and finds no substantial evidence, it dismisses the charge, but the complainant retains the right under the Administrative Review Act for judicial review in the Circuit Court. Ill. Rev. Stat. ch. 48, §860 (1979). If the Circuit Court reverses the dismissal, it will remand to the Commission for issuance of a complaint and adjudication through a public hearing. On the other hand, the complainant receives much worse treatment if his case is terminated due to the Commission's failure to convene a timely fact finding conference. Termination under these circumstances is not reviewable under the Administrative Review Act because it

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8/ The state's solution to the problem appears to have more in common with speedy trial rules for criminal cases than with any precedent in civil cases. If the case does not move quickly enough, it will be dismissed. That may well be the best way to deal with criminal matters, for the burden of delay falls on the public as a whole. But in this civil matter the whole burden of delay falls on the complainant, the very party whose rights were violated.

is not an "order of the Commission." Ill. Rev. Stat. ch. 48, ¡860 (1979). Thus, this irrational scheme allows even an unfounded or frivolous charge to be decided on its merits and permits judicial review of that decision if the Commission complies with the 120 day deadline. When the Commission is negligent, however, even a valid charge is never decided and no review is possible.

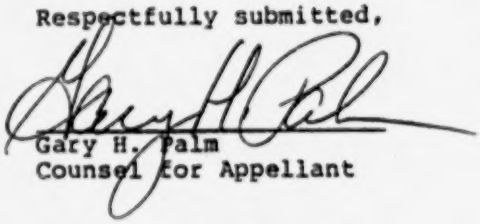
Finally, there is no escape from the irrationality of the Illinois Supreme Court's decision. When the Company filed its Petition for Writ of Prohibition with the Supreme Court of Illinois, the time period allowed by statute for the filing of the charge had not yet run. Mr. Logan, who had previously been without legal assistance, sought counsel and filed a second, identical claim of discrimination. In so doing, he hoped to cure the problem caused by the Commission's failure to convene a timely fact finding conference. However, the Supreme Court of Illinois dismissed the second charge, stating that to proceed with it "would frustrate the design" of the statutory scheme. Zimmerman Brush Co., Appendix A at 8a.

Thus, despite diligence beyond that required of him by the FEPA, Mr. Logan has lost his right to a cause of action. A rule requiring dismissal under the circumstances present in this case is irrational and unjust, and this Court should determine that it violates equal protection.

CONCLUSION

For these reasons, the appellant Laverne Logan respectfully prays that this Court note probable jurisdiction of this appeal.

Respectfully submitted,



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OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* September *in the year of our Lord, one thousand nine hundred and* eighty *, within and for the State of Illinois.*

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE HOWARD C. RYAN — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE THOMAS E. KLUCZYNSKI

TYRONE C. FAHNER ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, *that afterwards, to-wit, on the* 29th *day of* September *, 19* 80 *the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:*

Zimmerman Brush Company, an Illinois corporation,
Petitioner

No. 53199 vs.

The Illinois Fair Employment Practices Commission, a State Agency; et al., etc.,
Respondents

} Prohibition

CLELL L. WOODS
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS

10 (10827—334—12-78)

Docket No. 53199—Agenda 49—May 1980.

ZIMMERMAN BRUSH COMPANY, Petitioner, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, Respondent.

MR. JUSTICE WARD delivered the opinion of the court:

On November 9, 1979, Laverne Logan was discharged from his employment at the Zimmerman Brush Company (company) in Chicago, on the ground that he was unable to perform his duties on an assembly line due to a physically handicapped left leg. On November 14, Logan filed a charge with the Illinois Fair Employment Practices Commission (Commission) claiming that he had been discriminated against because of his handicap. On January 30, 1980, the company was notified by the Commission to be present at a fact-finding conference set for March 18, 1980, in order to "define the issues, determine which facts are undisputed, obtain evidence, and ascertain whether there is a basis for a negotiated settlement of the charge." The company was also asked to complete a two-page questionnaire regarding the circumstances of Logan's discharge. The company answered the questionnaire and returned it on March 7.

On March 18 the company appeared for the sole purpose of moving to dismiss the charge on the ground that the conference was convened 125 days after Logan's charge was filed, which was beyond the 120-day period provided for in the Fair Employment Practices Act (Ill. Rev. Stat. 1979, ch. 48, par. 858(b)). Since the meeting was not held within the prescribed period, the company said the Commission lost jurisdiction and should dismiss the charge. Upon the oral denial of the motion and the hearing officer's statement that the conference was to proceed, the company refused to participate and left the meeting.

On March 20 the company moved in this court for leave to file a petition for writ of prohibition under Supreme Court Rule 381(a) (73 Ill. 2d R. 381(a)). On March 25 the motion was allowed, briefs were ordered, the proceeding before the Commission was stayed, and oral argument on whether the writ should be allowed was set for June 25. On April 30, Logan filed a second charge with the FEPC which was identical to the first. The Commission notified the company of its intention to proceed with the second charge and the company moved to stay

the second proceeding pending a decision on its petition for a writ of prohibition. We allowed the motion to stay.

The controversy here concerns the interpretation to be given section 8(b) of the Fair Employment Practices Act, which provides:

> "(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown." Ill. Rev. Stat. 1979, ch. 48, par. 858(b).

The company contends that the legislature, in providing that the Commission "shall convene" a fact-finding conference within 120 days after a charge has been filed with the Commission, intended to make mandatory the convening of a fact-finding conference within this prescribed time period. It contends further that a failure by the Commission to do so would result in an automatic dismissal of the charge. The Commission's position is that the provision in section 8(b) for convening a conference is only directory and that one may be called beyond the 120-day period. The complainant Logan states that, even if "shall convene" is deemed here to be mandatory, the automatic dismissal of his charge should not be the consequence of the Commission's failure to convene the conference within the prescribed statutory period.

The use of "shall" in a statutory provision does not of itself require that the provision be held to be mandatory rather than directory. One must consider the word within the context of the entire statute, looking particularly to the purpose of the legislation. (See *Miller v. Department of Registration & Education* (1979), 75 Ill. 2d 76, 81; *In re Armour* (1974), 59 Ill. 2d 102, 104; *Carrigan v. Illinois Liquor Control Com.* (1960), 19 Ill. 2d 230, 233.) Applying this principle we judge that the legislative direction to convene a fact-finding conference within the 120-day period is a mandatory one.

Section 8(b) was approved and became effective in September of 1978 shortly after this court interpreted the existing section 8(c), which required that the FEPC decide

whether or not a complaint "shall" issue within 180 days after receipt of an employee's charge. In *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, this court analogized the 180-day period to a period of a statute of limitations and also noted the financial impact upon an employer who might be confronted by a complaint long after the alleged unfair employment practice. The court went on to hold that "the 180-day period prescribed in the statute was intended to ensure expeditious action on behalf of the FEPC, and must be considered mandatory." (71 Ill. 2d 61, 68.) It was also observed: "The respondents have the right to expect that the impact of such administrative orders will be minimized by compliance with the statutory time limitations." (71 Ill. 2d 61, 73.) Shortly thereafter in *Board of Governors v. Illinois Fair Employment Practices Com.* (1979), 78 Ill. 2d 143, 149, the decision in *Springfield-Sangamon* was upheld as being "clear and unequivocal," and this court issued a writ of prohibition against the Commission, which had filed a complaint more than two years after the expiration of the 180-day statutory period.

As stated, section 8(b), requiring that "the Commission shall convene a fact finding conference" within 120 days after receiving an unfair employment practices charge, was added to the Act by amendment eight months after the decision in *Springfield-Sangamon*. We consider that the legislature's use again of the term "shall" in section 8(b) indicates an intention that the prescription of a 120-day period be given a mandatory construction. This court has stated that where "previously construed terms in the unamended sections are used in the amendment, it is generally concluded that the legislature intended to adopt the prior construction given to these terms." (*Hupp v. Gray* (1978), 73 Ill. 2d 78, 86, citing 1A Sutherland, Statutes and Statutory Construction sec. 22.35 (4th ed. 1972).) Though the question here is not identical, the principle of construction is applicable especially where, as here, the term previously construed appears in a later amendment to the same section of the statute. It is a canon of construction that the General Assembly is presumed to know how the courts have interpreted a particular statute and to have acted thoroughly and conscientiously. (See, *e.g.*, *People v. Manning* (1979), 76 Ill. 2d 235, 241. See also 2A Sutherland, Statutes and Statutory Construction sec. 57.05 (4th ed. 1973).) It is reasonable

to consider that under these circumstances the legislature intended to adopt the prior construction of "shall."

The Commission would have us hold that the legislative pronouncement is but directory. It argues that the financial impact upon the employer in *Springfield-Sangamon*, when confronted with the prospect of being liable for back pay and interest over an extended period of time, was far greater than whatever impact there might have been here by a delay of five days in scheduling a conference.

We deem that this contention that the conference should be allowed to proceed beyond the 120-day period interprets *Springfield-Sangamon* too narrowly and ignores the goals underlying section 8(b). The fact-finding conference is specifically designed "for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." (Ill. Rev. Stat. 1979, ch. 48, par. 858(b).) Before the provision was added to the Act in 1978 there was no formal opportunity for expeditiously resolving a dispute. The only indication of whether it was deemed that the employee's charge was supported by "substantial evidence" (Ill. Rev. Stat. 1979, ch. 48, par. 858(c)) would be on or before the 180th day after the filing of the charge when the Commission's decision to issue a complaint against the employer or not to issue a complaint was announced.

Under section 8(b) the interests of both employee and employer can be served in that each is given an opportunity to discuss and possibly settle the dispute without formal action being taken against the employer by the Commission. Through a conference, unnecessary costs may be avoided and the Commission permitted to devote itself to other matters. Even if a settlement is not reached at this stage, the proceeding can be importantly valuable to the Commission in that the conference not only places the Commission in a better posture to decide whether to dismiss the employee's charge, it also aids the Commission in setting up a procedural framework for the conciliatory process which follows. (See Ill. Rev. Stat. 1979, ch. 48, par. 858(c).) The public interest in an expeditious resolution of disputes which is made possible though section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon*. Avoiding unnecessary

expenditures of time and money by all parties serves to further the stated policy of the Act, which is not only to protect employees from unfair employment practices but also to protect "employers, labor organizations and employment agencies from unfounded charges of discrimination." Ill. Rev. Stat. 1979, ch. 48, par. 851.

That a default order may be entered against a party failing to attend the conference not only illustrates the importance the legislature attached to this stage of the proceedings but also it supports our view that the provision for the convening of a conference within 120 days is a mandatory one. In *Tuthill v. Rendelman* (1944), 387 Ill. 321, 350, the court cited *Clark v. Quick* (1941), 377 Ill. 424, 430, where it was said: "Where terms of the statutes are peremptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory."

We cannot adopt the employee's contention that the Commission's failure to convene a fact-finding conference should not result in the automatic dismissal of the action and that the Commission should be allowed to proceed without a conference having been held. To adopt this position would frustrate the purpose of attempting to facilitate just and expeditious resolutions of employment disputes. The fact-finding conference was clearly intended to be an integral and mandatory phase of the complaint process. Such conferences benefit the Commission, the employee and employer, and, of course, the public interest. Without a required fact-finding conference the Commission would in most instances have to proceed solely on the basis of the employee's charge. Unless the Commission would be able to obtain information regarding the charge from some independent investigation its decision of whether or not to file a complaint would hardly be an informed one.

The Commission and Logan also contend that the company waived its right to object to the Commission's decision to proceed with the conference on the 125th day and also is estopped from claiming that the Commission has lost jurisdiction over the dispute. The contention is founded upon the company's response to the Commission's questionnaire regarding the circumstances of the employee's discharge. The questionnaire was filed with the Commission on March 7, six days before the 120-day

period had expired and 11 days before the date on which the conference was actually convened on March 18.

The contention must be denied. The company simply complied with the Commission's direction or request in completing the questionnaire. Had it not done so, as the company points out, it would have been responsible for delaying the proceeding. Too, it is not shown that the company was aware that the 120-day period under section 8(b) would expire before the scheduled date of the conference. We do not find a basis for estoppel or waiver. See generally *Pantle v. Industrial Com.* (1975), 61 Ill. 2d 365; *Levin v. Civil Service Com.* (1972), 52 Ill. 2d 516; *Lowenberg v. Booth* (1928), 330 Ill. 548; *Town & Country Bank v. James M. Canfield Contracting Co.* (1977), 55 Ill. App. 3d 91.

We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights.

The employee makes two other arguments. He says that the question regarding his charge against the company has been mooted because he filed a second and identical charge against the company before the 180-day statutory period within which a charge must be filed had expired. This, he argues, allows the Commission to proceed as if the first charge had never been filed. He further contends that the second charge is governed by the Illinois Human Rights Act, which became effective on July 1, 1980. (Ill. Rev. Stat., 1979 Supp., ch. 68, par. 1–101 *et seq.*). Logan directs attention to section 7–102(C)(3), which he says makes the convening of a fact-finding conference discretionary with the Commission. That section provides:

> "Upon reasonable notice to the complainant and the respondent, the Department may conduct a fact-finding conference. The fact-finding conference shall be held within 120 days of the date on which a charge has been filed unless waived by the parties in writing 10 days before the 120 day period has expired." Ill. Rev. Stat., 1979 Supp., ch. 68, par. 7–102(C)(3).

The argument ignores the principle that a statute will be given prospective application unless there is a

clear expression of legislative intent that it is to be retroactively applied. (See, *e.g.*, *People ex rel. American Federation of State, County & Municipal Employees v. Walker* (1975), 61 Ill. 2d 112; *Vendo Co. v. Stoner* (1974), 58 Ill. 2d 289, *cert. denied* (1975), 420 U.S. 975, 43 L. Ed. 2d 655, 95 S. Ct. 1398; *Country Mutual Insurance Co. v. Knight* (1968), 40 Ill. 2d 423.) It is evident there is nothing in the above-quoted section to require or permit retroactive application.

Too, this controversy was not made moot by the employer's filing a second charge with the Commission. As the complainant interprets the Act, as long as the 180 days within which he may file a charge with the Commission under section 8(a) have not expired, he is entitled to file another charge. To be consistent, it would seem he would have to contend that this would be so regardless of the fact that the Commission had dismissed an earlier charge or, as in this case, had failed to convene a fact-finding conference within 120 days, which resulted in the dismissal of the charge. To allow such interpretation, however, obviously would frustrate the design of sections 8(a) and 8(b) and, in a case such as this one, would allow the Commission, despite its failure to comply within the Act, to proceed on an identical charge after the first charge had already expired or suffered dismissal. Not only would an employer's rights be prejudiced if an employee were allowed to file a second and successive charge, but also the public interest in promoting an expeditious resolution of charges would be circumvented.

For the reasons given, the petition for writ of prohibition is allowed.

Writ awarded.

FAIR EMPLOYMENT PRACTICES ACT

AN ACT to promote the public health, welfare and safety of the People of the State of Illinois by reducing denial of equality of employment opportunity.

851. Declaration of policy

Declaration of policy. Whereas denial of equal employment opportunity because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare:

Therefore, it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service should be protected by State law.

It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination.

853. Unfair employment practices.

(c) For any labor organization because of the race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, military service, of any person to discriminate against such person, or to limit, segregate or classify its membership with respect to such person, or to limit such person's employment opportunities, such person's selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely such person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or such person's wages, tenure, hours of employment or apprenticeships conditions; or

(d) For any employer, employment agency or labor organization to discriminate against any person because he or she, reasonably and in good faith, has opposed any practice forbidden in this Act, or because he or she, reasonably and in good faith, has made a charge, testified or assisted in any investigation, proceeding or hearing under this Act. . . .

856. Powers and duties of the Commission

Powers and duties of the Commission. In addition to other powers and duties prescribed in this Act, the Commission shall have the powers and duties enumerated in Sections 6.01 through 6.08.

858. Procedure--Charge, investigation, conference, settlement and adjustment

Procedure--Charge, investigation, conference, settlement and adjustment. (a) Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant or by the Commission upon a vote of at least 3 members and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice.

(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown.

(c) If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed; otherwise, a Commissioner or an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the conference or conciliation meeting shall not be disclosed by the Commission unless the complainant and respondent agree in writing that such disclosure be made. When a settlement is effectuated in conference and conciliation conducted by a Commissioner or attorney, the terms of settlement and adjustment shall be subject to the approval of the Commission. The Commission shall notify the

complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any member of the Commission who takes part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as provided in this Section, the manner and form of filing charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe. If a settlement is effectuated, and the terms thereof are approved by the Commission, then the Commission shall prepare written terms of settlement and adjustment and have the complainant and respondent agree to them in writing. The Commission shall then enter upon all parties an order in accord with the executed written terms of settlement and adjustment. If the Commission determines after an investigation that there is substantial evidence that the respondent has violated the terms of settlement and adjustment and the order entered pursuant thereto, the Commission may either commence an action pursuant to Section 11 of this Act, or issue a written complaint and order a public hearing on such alleged violation, and, finding that such alleged violation has occurred, may then order such remedies as may be necessary to correct the violation. If the Commission finds that no violation has occurred it shall dismiss the complaint. If terms of settlement and adjustment not approved by the Commission are entered into by a complainant and respondent, the Commission need not enter an order in accord therewith and may terminate further proceedings in the case. The Commission may dismiss a charge if, in conference and conciliation, it is established to the satisfaction of the Commission that the respondent has taken steps to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof, or if, in conference and conciliation, the respondent offers and complainant declines to accept terms of settlement and adjustment which the Commission finds are sufficient to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof.

(d) The Commission shall, within 180 days after the expiration of the 120 day period specified in paragraph (b), or within any extension of the 180 day period agreed to in writing by all parties and approved by a member of the Commission, either issue and serve a complaint in the manner and form set forth in Section 8.01 or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and respondent.

858.01. Procedure--Complaint, answer, hearing and order

Procedure--Complaint, answer, hearing and order. (a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as alleged in the charge theretofore filed with the Commission as here

inbefore provided in Section 8 of this Act and the relief sought on behalf of the person aggrieved and containing a notice of public hearing before a Commissioner or a duly appointed Adjudicator at a place therein fixed, to be held not less than 30 nor more than 90 days after the service of such complaint. The place fixed shall be within 100 miles of the place where the unfair employment practice is alleged to have been committed.

(b) Any complaint may be amended under oath by leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown, upon reasonable notice to all interested parties at any time prior to the issuance of an order based thereon. A motion that the complaint be amended to conform to the evidence, made prior to the close of the public hearing, may be addressed orally on the record to the Commissioner or Adjudicator conducting the public hearing and, if such a motion is made, it shall be granted for good and sufficient cause. The respondent shall file an answer under oath or affirmation to the original or amended complaint within 30 days of the date of service thereof, but the Commissioner or Adjudicator conducting the public hearing may, for good cause shown, grant further time for the filing of an answer. In the event that the respondent files a motion to dismiss the complaint within 30 days and the motion is denied by the Commissioner or Adjudicator conducting the public hearing, the time for filing the answer shall be within 15 days of date of denial of the motion. Any allegation in the complaint which is not denied or admitted in the answer is deemed admitted unless the respondent states in the answer that he is without sufficient knowledge or information to form a belief with respect to such allegation. The failure to file an answer is deemed to constitute an admission of the allegations contained in the complaint. The respondent has the right to amend his answer upon leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown. Both the complainant and the respondent may appear at the hearing and examine and cross-examine witnesses.

The testimony taken at the hearing shall be under oath or affirmation and a transcript thereof made and filed in the office of the Commission. The testimony taken at the hearing is subject to the same rules of evidence that apply in courts of this State in civil cases.

(c) When all the testimony has been taken, the Commissioner or Adjudicator shall determine whether the respondent has engaged in or is engaging in the unfair employment practice with respect to the person aggrieved as charged in the complaint. A determination sustaining a complaint shall be based upon a preponderance of the evidence. The Commissioner or Adjudicator then shall state his recommendations in writing and, if he finds against the respondent, shall issue and cause to be served on such respondent and the complainant a recommended order requiring such respondent to cease and desist from the unfair employment practice complained of, and to take such further affirmative or other actions

with respect to the person aggrieved, including but not limited to reinstatement or hiring, back pay, costs, and reasonable attorney fees where appropriate, as will eliminate the effect of the practice complained of. An award of back pay shall not be made for any period more than two years prior to the filing of the charge. If, upon all the evidence, the Commissioner or Adjudicator finds that a respondent has not engaged in the unfair employment practice charged in the complaint or that a preponderance of the evidence does not sustain the complaint, he shall state his findings of fact and shall issue and cause to be served on the respondent and the complainant a recommended order dismissing the complaint. Such a recommendation order dismissing the complaint may include an award of reasonable attorney fees in favor of the respondent if it is determined that the complaint was frivolous or unreasonable or that the complainant continued to litigate after it clearly became so.

858.01a. Actions--Injunctions--Limitation

In the case of any charge of an unfair employment practice which has been properly filed with the Commission prior to March 30, 1978, which has not been settled or adjusted by conference and conciliation under Section 8, and which within 180 days thereafter has not been the subject of a complaint issued by the Commission or an order that no complaint be issued, the person filing the charge may seek appropriate injunctive or other relief by filing an action in the circuit court of the county where the alleged unfair employment practice occurred, and if the person prevails in such action the court may award such person costs and reasonable attorneys' fees. The Commission shall notify all such persons by registered mail of their right to seek such relief and any such action must be initiated in the circuit court within 2 years of the receipt of such notice, notwithstanding any other statute of limitations imposed on such actions.

858.02. Procedure--Review by Commission, order

Procedure--Review by Commission, order. (a) The findings and recommended order of the Commissioner or Adjudicator shall be filed with the Commission.

(b) Any party to the proceedings may file written exceptions, supported by argument, to the findings and recommended order of the Adjudicator within 30 days after service of said findings and recommended order on such party. Copies thereof shall be served on all other parties at the same time. Any other party may file a written response to such exceptions and argument within 21 days thereafter, serving copies at the same time on all other parties. Any party shall be allowed oral argument before the Commission by requesting same at the time of filing its written exceptions or responses as hereinabove provided. If any party requests oral argument in this manner, the Commission shall schedule oral arguments to be heard before at least a majority of the members of the Commission, and shall notify all parties in writing

of the time and place for such arguments. Any other party not previously requesting oral argument shall be permitted to present such arguments at the time and place scheduled by filing a written demand therefor with the Commission not less than 10 days prior to the date set for oral arguments.

(c) The Commission, on its own motion or pursuant to the written request of any party made at the time of filing exceptions or responses as hereinabove provided, may remand a case to an Adjudicator or Commissioner for purposes of a rehearing or for hearing additional evidence in the matter. In such event, the Commission shall issue and serve on all parties a written order remanding the cause and specifying the additional evidence which shall be taken. The Adjudicator or Commissioner presiding at such rehearing or additional evidence shall set a date therefor upon due notice to all parties. After conclusion of such rehearing or additional evidence, the Adjudicator or Commissioner shall file written findings and recommendations based thereon with the Commission, serving copies at the same time on all parties in the same manner as provided in Section 8.01(c) hereof. Such findings and recommendations shall be subject to review by the Commission as provided in this Section.

(d) Following the filing of the findings and recommended order of the Adjudicator or Commissionerand any written exceptions and responses thereto, and any other proceedings provided for in this Section, the Commission shall review the record and may adopt, modify or reverse in whole or in part the findings and recommendations of the Adjudicator. The Commission shall adopt findings of fact of the Adjudicator or Commissioner contrary to the manifest weight of the evidence. The Commission shall file its written order and decision in its office and serve copies thereof on all parties together with a notification of the date when it was filed.

(e) The Commission may, at any time prior to final order of the Court in a proceeding under Section 10 or 11, upon reasonable notice, modify or set aside in whole or in part any finding or order made by it in accordance with this Section. Any such modification shall be accomplished by the filing and service of a supplemental order and decision by the Commission in the same manner as provided in subsection (d) hereof.

859. Additional powers of the commission--Appearances of witnesses--Service of process

Additional powers of the commission; appearances of witnesses; service of process. For the purpose of all hearings and investigations:

(a) The Chairperson of the Commission shall issue subpoenas on a form prescribed by the Commission, at the instance of the Commission, or of the Commissioner or Adjudicator conducting a public hearing, or at the instance of a respondent or complainant to the proceed

ings, whenever necessary to compel the attendance of a witness or to require the production for examination of any books, payrolls, records, correspondence, documents, papers or other evidence in any investigation of an unfair employment practice charge or in connection with any hearing before the Commission, or a member thereof, or an a Adjudicator. Official signed forms of subpoenas may be obtained from the Commission in accordance with rules and regulations which it may from time to time prescribe.

(b) If any witness resides outside of the State, or through illness or any other cause is unable to testify before the Commission at the hearing or investigation, his or her testimony or deposition may be taken, within or without the State, in the same manner as is provided for in the taking of depositions in civil cases in circuit courts.

(c) For good cause shown the Commission or an Adjudicator on motion may quash or modify any subpoenas, and in the case of a subpoena duces tecum, issued and served at the instance of the Commission, the Commission shall upon request pay the reasonable expense, as determined by the Commission, of producing or providing any item specified in the subpoena.

(d) In case of failure or refusal to obey a subpoena issued to any person, the Circuit Court of the county in which such person resides or has his or her principal place of business, upon petition by the Commission, and after a hearing on such petition, has jurisdiction to issue an order requiring such person to appear before the Commission, there to produce evidence, if so desired, or there to give testimony touching the matter under investigation or in question. Before petitioning the Court for such order, the Commission shall first serve notice upon such person, not less than 5 days prior thereto, stating the time and place where the petition is to be presented. Failure to obey any order issued by the Court may be punished by the Court as contempt thereof.

(e) Except as otherwise provided in this Act, complaints, orders and other process and proper papers shall be served in accordance with such rules and regulations as the Commission may from time to time prescribe. The verified return of the individual making service in accordance with this Section, and setting forth the manner of such service shall constitute proof of service. Witnesses summoned before the Commission or a member thereof shall be paid the same fees and mileage as are paid witnesses in the Circuit Courts of this State, and witnesses whose depositions are taken or the person taking the same shall severally be entitled to the same fees as are paid for like services in the Circuit Courts of this State.

860. Review under Administrative Review Act

Review under Administrative Review Act. Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this Act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended (Ill. Rev. Stat., Ch.110 §264 et seq.); and the Commission in proceedings under this Section may obtain an order of Court for the enforcement of its order.

861. Judicial enforcement

Judicial enforcement. Whenever the Commission concludes that any person has violated a valid order of the Commission issued pursuant to Sections 8, 8.01 and 8.02 of this Act, and the violation and its effects are not promptly corrected, the Commission shall commence an action in the name of the People of the State of Illinois by petition, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission. Upon the commencement of such action the Court shall have jurisdiction of the proceedings and power to grant or refuse, in whole or in part, the relief sought or such other remedy as the Court may deem proper, provided that the Court may stay an order of the Commission in accordance with paragraph (1)(a), Section 12 of the "Administrative Review Act," pending disposition of the proceedings. The Court may punish for any violation of its order as in case of civil contempt. Actions of the Court under this Section shall take precedence over all other matters except matters of the same character.

862. Venue

Venue. The proceedings provided in Sections 10 and 11 shall be commenced in the Circuit Court in and for the county wherein the unfair employment practice which is the subject of the Commission's order was committed and shall be given precedence over all other civil cases except cases arising under the "Workmen's Compensation Act," approved July 9, 1951, as heretofore or hereafter amended or the "Worker's Occupational Diseases Act," approved July 9, 1951, as heretofore or hereafter amended.

APPENDIX

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Affidavit

James E. Braxton, being first duly sworn, on oath deposes and states as follows:

1. That he is Executive Director of the Illinois Fair Employment Practices Commission.

2. That in said capacity he is familiar with the various records, surveys and docket summaries concerning the caseload of charges filed with and disposed of by the Commission in recent years.

3. That those sources reveal that the Commission's caseload activity for the four most recent fiscal years has been approximately as portrayed in Table I below:

TABLE I

Caseload Data

	FY 74	FY 75	FY 76	FY 77	FY 78
Charges filed during year	1668	2301	2759	2120	———
Carried over from prior year	1624	1717	2233	3077	3481
Charges disposed of during year	1575	1785	1915	1716	———

4. That Commission records reveal the following approximate breakdown by age of charges which were pending for investigation by the Commission as of the dates indicated:

TABLE II

Charges Pending Longer Than 180 Days

	As of 7/1/76	As of 1/1/78
Number of Charges Pending More Than 180 Days	1453	2901
Total Charges Pending For Investigation	3077	3572

5. That the Commission's appropriation from the State's general revenue fund over the last four fiscal years has been as follows:

TABLE III

General Revenue Fund Appropriations to Commission

(Thousands of Dollars)

FY 74	FY 75	FY 76	FY 77
830.1	950.1	921.9	1114.1

6. That Commission records reveal the following approximate breakdown, by type of discrimination alleged, of charges filed with the Commission during the last four fiscal years.

TABLE IV

Charges Filed By Type

	FY 74 %	FY 75 %	FY 76 %	FY 77 %
Race, Color	812 (48.7)	987 (42.9)	1,352 (49.2)	877 (41.4)
Sex	466 (28.0)	1,049 (45.6)	755 (27.3)	476 (22.5)
Religion	20 (1.2)	21 (.9)	47 (1.7)	28 (1.3)
National Origin/ Ancestry	167 (10.0)	145 (6.3)	248 (.9)	232 (10.9)

TABLE IV cont.

Charges Filed By Type

	FY 74	%	FY 75	%	FY 76	%	FY 77	%
Retaliation	42	(2.5)	51	(2.2)	44	(1.6)	62	(2.9)
Arrest	7	(.4)	6	(.3)	19	(.7)	6	(.3)
Handicaps	0	(.0)	0	(.0)	91	(3.2)	211	(10.0)
Military Discharge	0	(.0)	0	(.0)	0	(.0)	2	(.1)
Multiple	154	(9.2)	42	(1.8)	203	(7.3)	226	(10.6)
	1,668		2,301		2,759		2,120	

Further affiant sayeth not.

Affiant

Subscribed and Sworn to before me

this 17th day of February, 1978

NOTARY PUBLIC